

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Whether respondent is entitled to a setoff under K.S.A. 44-501(h) for the social security benefits being paid to claimant.

Additional issues raised before and decided by the Administrative Law Judge dealing with claimant's entitlement to future medical benefits, the lien of Fireman's Fund, and an overpayment of temporary total disability benefits were not appealed to the Appeals Board and as such are affirmed pursuant to the Award of the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

- (1) On June 8, 1996, claimant suffered personal injuries by accident when he was involved in a motor vehicle accident while delivering pizzas for respondent. While claimant does not recall the particulars of the accident, he does recall waking up following the accident suspended by his seat belt inside his overturned vehicle. Claimant suffered several injuries to his head, arm, and ribs. He was initially treated at St. Joseph's Medical Center in Wichita, Kansas, was hospitalized overnight, and released the next day on June 9, 1996. Claimant did not return to work following this accident.
- (2) On June 17, 1996, claimant awoke and appeared disoriented and confused. He was provided medical care and was diagnosed as having suffered from a subdural hematoma. Initially, it was thought claimant had suffered a stroke unrelated to the motor vehicle accident but medical evidence later confirmed that claimant had suffered a brain injury as a result of the June 8, 1996, accident.
- (3) Prior to this accident claimant had an episodic tremor in his left arm. After the accident claimant was diagnosed as possibly suffering from Parkinson's disease, the tremor in his left upper extremity became more pronounced, and claimant suffers from short-term memory loss, unsteady gait, shortened attention span, and impaired balance. The medical evidence establishes claimant's cognitive difficulties and physical limitations are the result of the June 8, 1996, motor vehicle accident.
- (4) At the time of the accident, claimant was 72 years old and had been retired for approximately nine years. For eight years before the accident, claimant had worked for

respondent as a part-time delivery person to supplement his social security retirement benefits which he received monthly in the amount \$648.

(5) The medical evidence and the record consists of the reports of Dr. Eustaquio O. Abay II and the medical reports and deposition of Mitchell A. Woltersdorf, Ph.D. The Administrative Law Judge excluded certain medical records, including Dr. Woltersdorf's written report of August 27, 1996, which were stipulated for the purpose of preliminary hearing but not offered thereafter. As no party raised an issue with this exclusion, those records will not be considered by the Appeals Board.

(6) Dr. Abay, in his medical report of September 3, 1996, confirms, after reviewing a CT scan of the brain and MRI of the cervical spine, that claimant did not have a cerebral infarction as originally thought. He opined that most probably claimant's left upper extremity paresis is related to the cerebral contusion/concussion from the motor vehicle accident. Dr. Abay confirmed the diagnosis regarding the injuries with claimant and concluded, based upon the CT-scan and MRI, that claimant did not suffer a stroke.

(7) Claimant was further examined, and underwent a battery of tests, with Dr. Woltersdorf. While at first claimant appeared alert, oriented and cooperative, during the testing claimant interrupted the examiner on several occasions requesting repeated information and instructions. Claimant displayed significant difficulties in paying attention and further difficulties in grasping the concepts and understanding the instructions of the examiner. Claimant underwent a series of tests including the Halstead-Reitan Battery. These tests showed claimant had multiple deficits in complex attention, sustained attention, verbal fluency, and executive functions, including organizational skills. The right-side auditory was suppressed, and he had a possible non-verbal problem solving condition as well.

(8) Dr. Woltersdorf opined, based upon these tests, that claimant would be unable to drive and felt he displayed attention difficulties indicating the presence of a head injury. Dr. Woltersdorf further indicated claimant's disorganization was typical of a head injury.

(9) Claimant began developing the tremors which were later diagnosed as Parkinson's disease. This diagnosis was made by W. Mallonee, M.D., between the first and second examinations of Dr. Woltersdorf. Dr. Woltersdorf felt claimant's Parkinson's disease was trauma related rather than idiopathic.

(10) He went on to opine that claimant had a 38 percent combined functional impairment to the body as a whole and felt claimant was 100 percent impaired in his ability to work at any occupation. His refusal to allow claimant to drive would prohibit the claimant from working independently. His inability to walk and maintain balance would cause claimant to be unsafe while on his feet in most situations. Dr. Woltersdorf went on to state that if claimant were able to work in a wheel chair so that he was not on his feet regularly, he would be able to handle simple situations, perhaps in a sheltered workshop to some

degree, but would not be capable of competitive employment. He opined that claimant's ability to handle complex situations had been so reduced that he suspected no employer would be willing to employ him.

(11) Claimant brought an independent action in tort against the driver of the other vehicle involved in the June 8, 1996, accident. A \$60,000 total settlement was reached and the Administrative Law Judge in the Award computed the appropriate lien and future payments computations under K.S.A. 44-504. The parties acknowledged the computations and the offsets computed by the Administrative Law Judge were appropriate and, as such, the findings by the Administrative Law Judge are affirmed in that regard in so far as they do not conflict with the opinions expressed herein.

(12) The Administrative Law Judge, in the Award of August 19, 1997, found claimant to be permanently and totally disabled from any type of substantial gainful employment. Claimant appeared confused and disoriented and could not be left alone for periods of time because of his disorientation and memory lapses. Claimant had pronounced tremors that were aggravated by, and have accelerated since the accident. Claimant, at the time of regular hearing, was 73 years old, could not drive and would not be able to safely walk or stand by himself. These conditions appear to be permanent and, in the opinions of both Dr. Abay and Dr. Woltersdorf, were caused by the accident of June 8, 1996.

CONCLUSIONS OF LAW

In workers compensation matters, the claimant has the burden of proving his entitlement to an award of compensation by proving the various conditions upon which his right to a recovery depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g), as amended.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Respondent argues that claimant does not fit the definition of permanent total disability under the above statute. However, the Administrative Law Judge found claimant to have suffered permanent total disability after finding that claimant, a 73 year old at the time of the regular hearing, could not drive, could not stand or walk unassisted, was

confused and at times disoriented, and could not be left alone for periods of time because of his disorientation and memory lapses. The Administrative Law Judge went on to hold that employment in a sheltered workshop for no compensation, performing rote activities, does not amount to "substantial and gainful employment." The Appeals Board agrees and adopts the findings of the Administrative Law Judge that claimant has proven that he is permanently and totally disabled as a result of the automobile accident of June 8, 1996.

The Appeals Board will next consider the offset of social security benefits under K.S.A. 44-501(h).

The Administrative Law Judge, after reviewing the relevant statutes and appropriate case law, declined respondent's request for the social security offset. This decision by the Administrative Law Judge was based upon two findings. First, the Administrative Law Judge felt that the social security offset provisions were designed to prevent duplicate benefits. In this instance, claimant had been receiving the retirement benefits for approximately eight years prior to the automobile accident. The Administrative Law Judge found that the workers compensation benefits here awarded would not duplicate the social security retirement benefits but would attempt to restore claimant to the position he was in at the time of his injury, earning a modest wage in addition to his social security benefits. K.S.A. 44-501(h) states in part:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

However, the initial language of K.S.A. 44-501(h) "if the employee is receiving retirement benefits" does not appear to contemplate a rejection of the application of this statute merely because a claimant was receiving benefits prior to an accident. The language "is receiving" indicates the legislature did not make a distinction between benefits received prior to an accident and those begun after an accident occurred. Therefore, the Appeals Board finds the social security benefit offset would apply regardless of whether the social security benefits were being paid prior to an accident or were started after an accident occurred.

The Administrative Law Judge further justified a denial of the offset of benefits by analyzing the language of K.S.A. 44-501(h) which states "but in no event shall the workers

compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment." The Administrative Law Judge rationalized that as claimant was permanently totally disabled, this constituted a 100 percent functional impairment. As the statute requires claimant be paid no less than his functional impairment, then the 100 percent functional impairment would eliminate any right to a social security offset.

K.S.A. 44-510c(a)(2) defines permanent total disability as "when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

K.S.A. 44-510e(a) defines functional impairment as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein.

An analysis of the definition of both permanent total disability and functional impairment finds the two not synonymous. Functional impairment focuses on the physiological losses to the human body. On the other hand, permanent total disability focuses upon a claimant's ability to engage in substantial and gainful employment, *i.e.* work disability. A claimant can be 100 percent permanently totally disabled and yet have certain physical abilities left which would render him less than 100 percent functionally impaired. The Appeals Board finds, based upon an analysis of the above statutes, that the opinion by the Administrative Law Judge that claimant's 100 percent permanent total disability equates to a 100 percent functional impairment is error and is reversed.

The only opinion in the record regarding claimant's functional impairment is that of Dr. Woltersdorf who found claimant to have suffered a 38 percent functional impairment to the body as a whole. This opinion is adopted by the Appeals Board as being the most credible medical evidence on this issue.

K.S.A. 44-501(h) requires that the claimant's retirement benefits from social security be offset against his workers compensation benefits. In this instance, the parties have stipulated to an average weekly wage of \$183.26 which computes to a weekly benefit of \$122.17. In addition the parties have stipulated that claimant is receiving \$648 per month of social security retirement benefits which computes to \$149.54 per week. Simple mathematics would indicate that claimant's entire workers compensation award should be offset by the social security benefits being received. However, K.S.A. 44-501(h) does restrict the offset and requires that the workers compensation benefits shall be payable for not less than the employee's percentage of functional impairment. Therefore, the Appeals

Board finds that claimant has a 38 percent permanent whole body functional impairment for the injuries suffered on June 8, 1996.

In addition, the conclusion by the Administrative Law Judge regarding the offset of claimant's tort settlement recovery has been acknowledged by the parties as appropriate and, accordingly, respondent is responsible for reimbursing claimant for one-third of all future medical treatment costs associated with his accident and the respondent is obligated to pay claimant one-third of the weekly compensation benefits to which he would otherwise be entitled, in the amount of \$40.72, until such time as the settlement proceeds have been exhausted by the medical costs or permanent partial disability compensation benefits. When the settlement proceeds remaining in the amount of \$34,369.30, have been exhausted, respondent shall then be liable for 100 percent of all future medical costs and future medical care which will be considered upon proper application to and approval by the Director. In addition, upon exhaustion of the settlement proceeds, respondent shall be responsible to pay benefits in the amount of \$122.17 per week for the duration of claimant's permanent partial disability compensation award of 38 percent whole body functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore, dated August 19, 1997, should be, and is hereby, modified, and claimant, Preston Dickens, Jr., is granted an award against the respondent, Pizza Company, Inc., and its insurance carrier, Fireman's Fund Insurance, for a permanent total disability which is subject to the offset of benefits under K.S.A. 44-501(h) resulting in a 38 percent permanent partial whole body disability for the injuries suffered on June 8, 1996.

Claimant is entitled to 18.45 weeks temporary total disability compensation at the rate of \$122.17 per week in the amount of \$2,254.04 followed by 156.39 weeks permanent partial disability compensation at the rate of \$40.72 per week in the amount of \$6,368.16. When and if the remaining settlement proceeds of \$34,369.30 are exhausted by payment of medical costs and/or permanent partial disability compensation benefits, claimant shall make appropriate application to the Director for an adjustment of the permanent partial disability weekly compensation rate and application for future medical with the Director. Thereinafter, respondent shall be responsible for the payment of 100 percent of all future medical costs ordered by the Director and any compensation rates shall increase to \$122.17 per week for the duration of claimant's permanent partial disability award.

The Award by the Administrative Law Judge regarding past medical expense, unauthorized medical expense, attorney fees, and the fees necessary to defray the expense of the administration of the Workers Compensation Act are affirmed in so far as they are not in contravention to the opinions expressed herein.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: M. John Carpenter, Great Bend, KS
Richard A. Boeckman, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director